Penang Development Corporation v Teoh Eng Huat & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04-23-1991
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND PEH SWEE CHIN SCJJ
3 APRIL 1993

Agency *— Authority of agent — Principal a statutory body — Agreement drafted and entered into by officer of statutory body on its behalf — Whether agreement binding on statutory body — Whether officer was acting ultra vires — Burden of proof on statutory body to show absence of authority — Penang Development Corporation Enactment 1971 ss 10, 14(d) & 20(c)*

Public Authorities *— Statutory body — Building contract —Statutory body entering into agreement for construction and sale of dwelling house — Whether agreement was ultra vires powers and duties of statutory body under the enactment constituting it — Penang Development Corporation Enactment 1971 ss 3 & 14 — Housing Developers (Control and Licensing) Act 1966 s 2(1)(b)*

Public Authorities *— Contract — Building contract — Validity of clause in agreement — Whether clause ultra vires — Whether statutory body could mount collateral attack on clause — Whether statutory body should challenge clause by way of judicial review*

Contract *— Damages — Public policy — Statutory body engaged in housing development — Government policy requiring engagement of Bumiputra contractor to undertake construction of dwelling house — Delay in completion as government policy does not allow summary termination of contract — Claim for damages by purchaser of dwelling house — Whether public policy a defence*

The appellants, a statutory body set up pursuant to the Penang Development Corporation Enactment 1971 ('the Enactment'), were involved in a housing project and had delegated all matters relating to the project to a housing committee which they had appointed. An agreement ('the agreement') was entered into between the appellants and respondents for the sale and purchase of a link dwelling house. The agreement was prepared by the director of administration ('the officer') and was approved by the housing committee. The agreement was signed by the officer on behalf of the appellants. However, vacant posession was only delivered after a long delay and the respondents claimed liquidated damages against the appellants for breach of cl 11 of the agreement. Clause 11 states that the link house should be completed and ready for occupation within 18 months of the agreement whereby vacant possession should also be delivered to the respondents. By cl 25(b) of the agreement, it was provided that in the event of non-compliance by the appellants with the requirements of cl 11, the appellants would indemnify the respondents by payment of interest on the purchase price calculated from the due date until the date of delivery of vacant possession. The High Court judge agreed with the

decision of the sessions court and gave judgment in favour of the respondents. [See [1992] 1 MLJ 749.] The appellants have appealed.

The issues before the Supreme Court were based on Defences Nos 6 and 7 of the appellant's reamended statement of claim, ie:

(i) that cl 11 was included in the agreement without the authority of the appellants and so were not binding on the appellants; and/or
(ii) that cl 11 was void for being ultra vires; and/or being illegal as being contrary to s 2(1)(b) of the Housing Developers (Control and Licensing) Act 1966 ('the Act').

Held, dismissing the appeal:

(1) The question of the propriety or otherwise of the appellants mounting a collateral attack on the validity of cll 11 and 25(b) of the agreement or whether a direct attack to challenge their validity by the judicial review approach should have been made was not fully argued in this case and the court refused to make a definitive ruling on this important issue.
(2) There was evidence that the officer was authorized administratively to insert all the terms of the agreement, including cll 11 and 25. The burden of proof is on the appellants to prove the absence of authority, express or otherwise. So far, on evidence and on the law, the appellants have not on balance convinced the court that the officer acted without authority, either administrative or statutory, of the appellants.
(3) With regards to counsel for the appellants' contention that the idea of a time frame for the completion of the contract and the liquidated damages for failure to complete within the time frame was unnecessary and that cl 11 was not a usual term of a contract of the type under consideration and therefore the officer was acting outside the purview of s 14(d), the court held that cl 11, which was prepared with the authority of the appellants could not be ultra vires s 14(d) of the Enactment merely because it contained terms which were not usual to the contract. The relevent question is whether the clause is governed by the section so as to give the appellants jurisdiction whether or not to deal with it and if it does not, that the question of it being ultra vires the section cannot arise. Moreover, cll 11 and 25(b) are contractual terms and are not governed by the provisions of the Enactment unless it is specifically provided for in the Enactment.
(4) If losses or liabilities are incurred on account of the construction and sales of the appellants' houses, they must be accounted for out of the appellants' fund because since cl 11 is valid then it follows any expenses incurred on account of the breach of cl 11 is also valid and can be defrayed from the fund. It is the responsibility of the appellants to find money to pay the respondents after it had incurred the liability.
(5) Defence No 7 can hardly be tenable and does not deserve serious consideration, relying as it did on the doctrine of ultra vires and

alternatively on illegality with reference to s 2(1)(b) of the Act which are not relevant to serve as a basis for an allegation of ultra vires acts.

(6) As to counsel for the appellants' argument that the delay in the delivery of vacant possession of the dwelling house had been caused by the contractor, who by government policy was a Bumiputra company, and who by the same policy, could not have had its services terminated summarily and therefore, that constituted circumstances 'beyond the control' of the appellants within the meaning of the proviso to cl 11 so as to exempt the appellants from liability, the court found that the defences were raised on the basis of the proviso to cl 11 which the appellants attacked as invalid and the defences would therefore seem to cancel themselves out automatically. In any case the new economic policy was not designed to encourage Bumiputra entrepreneurs when given opportunities and privileges to secure contract from the government or semi-government bodies to make defaults in the performance of their contractual obligations with impunity. Once their tenders for the contracts were accepted they must perform their obligations subject to the penalties and the rights of the parties wronged for remedies available to them in law.

Per curiam:

If the corporation seriously considered that the terms of its own agreement was null and void for being ultra vires the corporation should obtain a declaration of invalidity of these two clauses and not to wait for the vendors to take action against them for breach of the agreement and to raise the vires defence to exonerate itself from its liability under the agreement.

[Bahasa Malaysia summary

Perayu, suatu badan berkanun yang ditubuhkan menurut Enakmen Perbadanan Pembangunan Pulau Pinang 1971 ('Enakmen itu'), terlibat dengan suatu projek perumahan dan telah menugaskan kesemua perkara yang berkaitan dengan projek itu kepada suatu jawatankuasa perumahan yang telah dilantik oleh mereka. Suatu perjanjian ('perjanjian itu') telah diikat diantara perayu dan penentang untuk jualbeli rumah kediaman. Perjanjian itu telah digubal oleh pengarah pentadbiran ('pegawai itu') dan telah diluluskan oleh jawatankuasa perumahan itu. Perjanjian itu telah ditandatangani oleh pegawai itu bagi pihak perayu. Tetapi, milikan kosong hanya diserahkan selepas suatu kelengahan yang panjang dan penentang telah menuntut gantirugi jumlah tertentu daripada perayu kerana memungkiri fasal 11 perjanjian itu. Fasal 11 menyatakan bahawa rumah 'link' itu mesti selesai dibina dan siap untuk didiami dalam masa 18 bulan dari tarikh peryempurnaan perjanjian itu dan milikan kosong juga mesti diserahkan kepada penentang. Menurut fasal 25(b) perjanjian itu, telah diperuntukkan bahawa sekiranya perayu tidak mematuhi keperluan fasal 11, perayu

akan menanggung rugi terhadap penentang dengan membayar bunga atas harga pembelian yang dikira dari tarikh yang telah ditetapkan untuk penyerahan milikan kosong hingga tarikh penyerahan milikan kosong. Hakim Mahkamah Tinggi telah bersetuju dengan keputusan mahkamah sesi dan telah memberi penghakiman memihak kepada pihak penentang. [Lihat [1992] 1 MLJ 749.] Perayu telah membuat rayuan.

Isu-isu dihadapan Mahkamah Agung berdasarkan Pembelaan No 6 dan 7 di dalam pernyataan tuntutan perayu yang telah dipinda, iaitu:

(i) bahawa fasal 11 telah dimasukkan kedalam perjanjian itu tanpa kebenaran perayu dan oleh itu tidak mengikat perayu; dan/atau

(ii) bahawa fasal 11 adalah tidak sah kerana ultra vires; dan/atau adalah menyalahi undang-undang kerana bertentangan dengan s 2(1)(b) Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta itu').

Diputuskan, menolak rayuan itu:

(1) Soal wajarnya atau tidak perayu membawa serangan kolateral ke atas keesahan fasal-fasal 11 dan 25(b) perjanjian itu atau sama ada serangan terus untuk mencabar keesahannya melalui cara pengkajian penghakiman sepatutnya dibuat tidak dihujahkan dengan sepenuhnya didalam kes ini dan mahkamah enggan membuat keputusan muktamad atas isu yang penting ini.

(2) Terdapat bukti yang menunjukkan bahawa pegawai itu diberi kuasa pentadbiran untuk memasukkan kesemua terma-terma perjanjian itu. Beban membukti terletak pada perayu untuk membuktikan ketiadaan kuasa, yang nyata atau yang sebaliknya. Setakat ini, berdasarkan bukti dan undang-undang, perayu pada imbangan, tidak berjaya meyakinkan mahkamah bahawa pegawai itu telah bertindak tanpa kuasa, sama ada pentadbiran atau statutori, perayu itu.

(3) Berdasarkan hujahan peguambela perayu bahawa tujuan mengadakan suatu tempoh masa untuk melaksanakan kontrak itu dan gantirugi jumlah tertentu untuk kegagalan melaksanakannya dalam tempoh masa itu adalah tidak perlu dan bahawa fasal 11 merupakan suatu terma yang tidak biasa dalam kontrak sebagaimana yang sedang ditimbangkan ini dan oleh itu pegawai itu bertindak diluar skop s 14(d), mahkamah memutuskan bahawa fasal 11 yang digubal dengan kebenaran perayu bukanlah ultra vires s 14(d) Enakmen itu hanya kerana ia mengandungi terma-terma yang tidak biasa di dalam kontrak itu. Soal yang relevan adalah sama ada fasal itu dikawal oleh seksyen itu supaya memberi perayu bidangkuasa sama ada hendak bertindak terhadapnya atau tidak dan jika tidak, soal bahawa ianya adalah ultra vires seksyen itu tidak boleh timbul. Lebih-lebih lagi, fasal-fasal 11 dan 25(b) adalah terma-terma contraktual dan tidak dikawal oleh peruntukkan Enakmen itu kecuali jika dinyatakan dengan spesifik di dalam Enakmen itu.

(4) Jika kerugian atau liabiliti dialami akibat pembinaan dan jualan rumah-rumah perayu, ia mesti dibayar dari tabung perayu itu dan oleh kerana fasal 11 adalah sah, sebarang belanja akibat kemungkiran fasal 11 jugalah sah dan boleh dibayar dari tabung itu. Adalah tanggungjawab perayu mendapat wang untuk membayar penentang selepas menanggung liabiliti itu.

(5) Pembelaan No 7 tidak dapat dipertahankan dan tidak perlu dipertimbangkan dengan serius, kerana ia berdasarkan doktrin ultra vires dan secara alternatif atas kepenyalahan undang-undang merujuk kepada s 2(1)(b) Akta itu yang tidak relevan menjadi asas pertuduhan perbuatan ultra vires.

(6) Merujuk kepada hujahan peguambela perayu bahawa kelengahan penyerahan milikan kosong rumah kediaman itu telah disebabkan oleh kontraktor, yang mengikut polisi kerajaan merupakan suatu kontraktor Bumiputra, dan mengikut polisi yang sama, perkhidmatannya tidak boleh ditamatkan secara terus dan oleh itu, ini merupakan suatu keadaan di luar kawalan perayu mengikut maksud proviso kepada fasal 11 dan ini mengecualikan perayu daripada liabiliti, mahkamah berpendapat bahawa pembelaan ini ditimbulkan atas asas proviso kepada fasal 11 yang telah dicabar oleh perayu dengan mengatakan ianya tidak sah dan oleh itu pembelaan nampaknya membatalkan antara satu sama lain secara automatik. Walaubagaimanapun polisi ekonomi baru tidak dirancangkan untuk menggalakkan usahawan Bumiputra apabila diberi peluang dan keistimewaan untuk mendapat kontrak dari kerajaan dan badan semi kerajaan untuk memungkiri pelaksanaan obligasi kontrak mereka dengan kebebasan. Sebaik sahaja tender kontrak mereka diterima, mereka mestilah melaksanakan tanggungjawab mereka tertakluk keapda penalti-penalti dan hak-hak pihak yang terganggu untuk mendapat remedi yang ada disisi undang-undang.

Per curiam:

Jika perbadanan itu benar-benar berpendapat bahawa terma-terma perjanjiannya itu adalah batal dan tidak sah kerana ultra vires perbadanan itu ia sepatutnya mendapatkan deklarasi ketaksahan kedua-dua fasal itu dan tidak menunggu sehingga pembeli mengambil tindakan terhadap mereka kerana kemungkiran perjanjian itu dan menimbulkan pembelaan ultra vires itu untuk mengelakkan dari liabiliti di bawah perjanjian itu.]

Notes

For cases on authority of an agent, see 1 *Mallal's Digest* (4th Ed) paras 390–424.

For cases on building contracts entered into by public authorities, see 10 *Mallal's Digest* (4th Ed) paras 1219–1220.

For cases on delays in building contract, see 3 *Mallal's Digest* (4th Ed) paras 909–910.

Cases referred to

1 *Penang Development Corporation v Teoh Eng Huat & Anor* [1992] 1 MLJ 749 (refd)
2 *Baroness Wenlock v River Dee Co* (1885) 10 AC 354 (refd)
3 *AG v Great Eastern Railway* (1880) 5 AC 475 (refd)
4 *Ashbury Railway Carriage & Iron Co v Riche* [1875] LR 7 HL 653 (refd)
5 *London Country Council v AG* [1902] AC 165 (refd)
6 *AG v Crayford Urban District Council* [1962] Ch 246 (refd)
7 *AG v Smethwick Corporation* [1933] 1 Ch 562 (refd)
8 *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 (refd)
9 *Royal British Bank v Turquand* (1856) 6 Ec B 377 (refd)
10 *Anisminic Ltd v Foreign Compensation Commissions & Anor* [1969] 2 AC 47 (refd)
11 *R v IRS, ex p Woolwich Building Society* [1990] 1 WLR 1400 (refd)
12 *London v Clydeside Estates Ltd v Aberdeen District Council* (1980) 1 WLR 182 (refd)
13 *Calvin v Carr* [1979] 2 WLR 755 (refd)
14 *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 (folld)
15 *Smith v East Elloe Rural District Council* [1956] DC 736 (refd)
16 *Quietlynn Ltd v Plymouth City Council* [1988] QB 114 (refd)
17 *R v Lambeth BC, ex p Clayhope Properties Ltd* 17 June 1987 *The Times* (refd)
18 *Wandsworth LBC v Winder* [1985] 1 AC 462 (refd)
19 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (folld)
20 *R v Panel on Take-Overs and Mergers, ex p Datafin PLC & Anor* [1987] 1 QB 815 (refd)
21 *Minister of National Revenue v Wrights' Canadian Ropes Ltd* [1947] AC 109 (refd)
22 *Fawcett Properties Ltd v Buckingham County Council* [1959] Ch 543 (refd)
23 *Freeman v Buckhurst* [1964] 1 All ER 630 (distd)
24 *Chew Hock San v Connaught* [1985] 1 MLJ 350 (distd)
25 *Brady v Todd* 9 CB (NS) 592 (distd)
26 *Tham Seow Hing v Chop Kwong Fatt Cheong* [1937] 6 MLJ 210 (distd)
27 *Printing and Numerical Registering Co v Sampson* [1875] 19 LR Eq 462 (refd)
28 *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (refd)

Legislation referred to

Penang Development Corporation Enactment 1971 ss 3, 10, 12, 14, 20(c) & 21A
Housing Developers (Control and Licensing) Act 1966 s 2(1)(b)

Appeal from: Civil Appeal No 12–31 of 1983 (High Court, Penang)

Lim Kean Chye and *Lim Ewe Hock* (*Murad & Foo*) for the appellant.
Louis Van Buerle (*Cheong Wai Meng & Van Buerle*) for the respondents.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): The appellant, Penang Development Corporation ('the corporation') is a statutory body established under the provisions of the Penang Development Corporation Enactment 1971 (No 10 of 1971) ('the Enactment') with powers, inter alia, to enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield-up, charge, mortgage, demise, reassign, transfer or otherwise dispose of or dealt with, any movable or immovable property or any interest therein vested in the corporation upon such terms as the corporation deems fit but not inconsistent with the provisions of the Enactment. The corporation consists of the chairman, two ex officio members, namely, the state secretary and the state financial officer and not more than six other members to be appointed by the state authority and three representatives of the Federal Government. However, at the material time there were altogether 18 members, including the managing director in the corporation. Under s 10 of the Enactment, the corporation may, by resolution, delegate to any member, officer or servant of the corporation the power and authority to carry out on their behalf such duties, powers or functions as the corporation may determine. The corporation is vested with duties and powers, inter alia, to promote the development of agricultural, industrial, commercial, trading and residential areas and/or projects in the state designated for such purposes; and to undertake agricultural, industrial, commercial, trading and *housing enterprises* (emphasis added) and to do all such other acts and things as are necessary for the exercise or performance of all or any of the functions and duties of the corporation. The corporation has its own fund known as the Penang Development Corporation Fund ('the fund') which consists of, inter alia, such sums as may from time to time be paid to the corporation out of the general revenues of the state of Penang, or donated by the government of Penang, the Federal Government or any government in the Federation or by any other person for the purposes of the corporation; such sums as may from time to time be raised by the corporation by loan as well as all rents and proceeds of sale profits and income and other funds derived by the corporation directly or indirectly from the property belonging to the corporation; and all such other sums as may from time to time be paid to the corporation. The fund is established under s 19 of the Enactment. The fund may be applied for the payment of the expenses and allowances of the members, the salaries, fees or remuneration of the officers, agents and servants and technical or other advisers of the corporation; and all costs, charges and expenses of and incidental to the exercise of the powers of the corporation under the Enactment. The fund may also be applied in defraying any other expenditure authorized by the corporation and properly chargeable to revenue account. It is also provided under s 21A that the expenses of the corporation shall be defrayed out of the moneys in the fund in accordance with the estimates as may be authorized. However, the corporation may at any time submit to the

chief minister a supplementary estimate for any one year and the chief minister may allow the whole or any part of the additional expenditure included therein. A

In line with the practice of all other statutory bodies in Malaysia, the corporation may set up committees to look after any specific project of the corporation and for this purpose the corporation may delegate under s 10 by resolution to the various committees its power and authority to carry out on their behalf such duties, powers or functions as the corporation may determine. One of such committees that was appointed and relevant to this appeal was the housing committee under the chairmanship at the material time of Prof AJ Ratnam who was also a board member. The other members of the housing committee consisted of the general manager and another officer. It is also pertinent to mention here that under s 12, the corporation may appoint or employ such officers and servants as may be reasonably necessary for the purpose of carrying out its functions and duties and all employees of the corporation are under the administrative control of the person charged with the responsibility for the general administration of the corporation, in other words, the general manager. In addition to the employment of officers and servants of the corporation, the corporation may also employ and pay agents and technical advisers whether solicitors, bankers, stockbrokers, surveyors or valuers or other persons, to transact any business or do any act required to be transacted or done in execution of the duties of the corporation or for better carrying into effect the purposes of the Enactment and may pay all charges and expenses so incurred. It was not disputed that there was such a housing committee on whom the corporation had delegated its duty to undertake housing enterprise and to deal with all matters relating to housing projects. In 1974, the corporation commenced its housing project on a piece of land owned by the corporation at a site known as Bayan Baru, Penang. B C D E F

At the material time, Encik Mokhtar bin Haniff was the director of administration in charge of general administration and legal matters including the preparation of sale and purchase agreements relating to houses built by the corporation. Although Encik Mokhtar bin Haniff was not a legally qualified officer nevertheless he was entrusted with the responsibility of preparing and drafting all sales and purchase agreements and to sign them after the approval of the housing committee had been obtained on the agreements. According to Encik Mokhtar, all matters relating to the sale of the houses under the housing project were to be decided by the committee without the necessity to refer the matter further to the corporation. The housing committee was the final authority on such matters of which it is not possible to say with certainty that it was a common knowledge available to the public. This is a matter of the internal administration of the corporation. It is significant to mention here that at the material time the general manager of the corporation was one Dato' Chet Singh and it was the general manager who gave Encik Mokhtar bin Haniff his schedule of duties but this schedule of duties were orally given to Encik Mokhtar bin Haniff. G H I

It was in the course of performing his duties as director of administration that he was entrusted to prepare the sale and purchase agreement ('the agreement') dated 12 December 1979 whereby the corporation agreed to

sell a link dwelling house to Teoh Eng Huat and Teoh Siew Eng ('the respondents') at the total price of RM82,364 to be paid by instalments in accordance with the rate and time prescribed in the third schedule to the agreement. This agreement, of which two of its clauses were impugned now by the corporation, was signed by Encik Mokhtar bin Haniff on behalf of the corporation as vendor and by the respondents as purchasers. Two clauses of the agreement were impugned by the corporation, namely, cll 11 and 25(b) by extension as being ultra vires and unenforceable against the corporation. The respondents had paid the purchase price in full but at the time of making the final payment the link house was not ready to be delivered up to the respondents and were only given possession of the house after a delay of 427 days. Under cl 11 of the agreement, the link house should be completed and ready for occupation by the respondents within 18 months of the agreement whereby vacant possession should also be delivered to the respondents. However, under the proviso to this clause the corporation was not liable for any failure to fulfil any term of the agreement if it was delayed, hindered or prevented by strike or combination of workmen, lockout, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, acts of god, floods or tempest, or failure to obtain any necessary sanction or approval of any local or other competent authority or any *other circumstances of whatsoever nature beyond the control of the vendor.* (Emphasis added.)

Since there was a delay of 427 days, the respondents claimed liquidated damages against the corporation in the sum of RM10,599 only and interest at the rate of 11%pa from 12 June 1981. The date when the building should be delivered to the respondents was 11 June 1981. Vacant possession was given only on 12 August 1982. A suit was filed in the sessions court by the respondents claiming liquidated damages under cl 25(b) for breach of cl 11. In their defence which was amended and reamended several times, several grounds of defence were advanced and for the purpose of this appeal it would be sufficient to state only the relevant grounds which were argued before us. It was averred by the corporation in their defence that:

(i) clause 11 of the agreement was made by mistake and in ignorance of s 2(l)(b) of the Housing Developers (Control and Licensing) Act 1966 (Rev 1973) ('the Act') and that it is not binding on the corporation;

(ii) and/or alternatively, the said cl 11 was included in the agreement without the authority of the defendants and therefore it is not binding on the defendants;

(iii) and/or alternatively, the said clause is void for being ultra vires; and/or being illegal as being contrary to s 2(1)(b) of the Act.

It was averred that the delay was caused by a Bumiputra contractor whose contract by reasons of government policy could not be terminated summarily and that it was necessary to give time to the contractor before their contract could be terminated. This policy constituted a circumstance beyond the control of the corporation, falling under the ambit of the proviso of cl 11 of the agreement. The learned president of the sessions court found that these defences could not be sustained and therefore gave judgment for the

respondents and from that judgment the corporation appealed to the High Court. The High Court agreed with the decision of the sessions court and dismissed the appeal. Hence the appeal before the Supreme Court.

In the High Court, the learned judge identified four main issues that were considered and dealt with by the sessions court and in the light of the arguments advanced before him considered those issues also in favour of the respondents. (See *Penang Development Corporation v Teoh Eng Huat & Anor.*[1]) The arguments in the sessions court, according to the learned judge, revolved around the following issues:

(1) Whether cl 11 was ultra vires the Enactment.
(2) If nay, whether cl 11 had been included in the agreement without the authority of the defendants and so was not binding on it.
(3) Whether cl 11 was inserted by mistake and in ignorance of s 2(1)(b) of the Act , and if so, whether it was binding on the defendants.
(4) If the agreement was found to be binding on the defendants whether the delay in the delivery of vacant possession of the dwelling house which had been caused by the contractor, who by government policy was a Bumiputra company, and who by the same policy, could not have had its services terminated summarily, constituted circumstances 'beyond the control' of the defendants within the meaning of the proviso to cl 11 so as to exempt the defendants from liability.

What appeared to be foremost in the mind of the learned judge was the question of ultra vires in the sense commonly used with reference to corporations and statutory bodies, ie the contemporary notion of ultra vires, in particular, that cl 25(b) read together with cl 11 was ultra vires the Enactment. Therefore, it was not surprising that the learned judge dealt adequately with this issue, expounding the doctrine of ultra vires and citing the time-honoured authorities such as *Baroness Wenlock v River Dee Co;*[2] *AG v Great Eastern Railway;*[3] *Ashbury Railway Carriage & Iron Co v Riche;*[4] *London County Council v AG;*[5] *AG v Crayford Urban District Council;*[6] *AG v Smethwick Corporation;*[7] and *Amalgamated Society of Railway Servants v Osborne.*[8] The learned judge expressed the view that cll 11 and 25(b) contained the usual terms encountered in building contracts of the kind under consideration before him and that the remedy provided in cl 25(b) for breach of cl 11 was incidental to the carrying out of the duties and functions of the corporation under the Enactment.

On the second issue the learned judge found that on the evidence of the corporation's own witness, Encik Mokhtar bin Haniff, the director of administration, he had authority to prepare and sign the agreement, he having been authorized by the general manager to do so and the agreement having been approved by the housing committee under the chairmanship of Prof AJ Ratnam, and in any event the issue was also decided on the indoor management rule as expounded in the case of *Royal British Bank v Turquand.*[9] The learned judge was also of the view that Encik Mokhtar bin Haniff in the performance of his duties as director of administration and in preparing and signing the agreement had actual authority and even if he had no such authority he had ostensible authority to do so.

On the third issue he held that there was no mistake on the part of Encik Mokhtar bin Haniff to include cll 11 and 25(b) as both parties intended to

make such a contract. It was the view of the learned judge that s 2(1)(b) of the Act, while exempting the corporation from the provisions of the Act, did not prohibit the corporation from entering into a form of contract, the terms of which were contemplated by the Act. With regard to public policy the learned judge found no merits on the submissions and that the delay was not caused as a result of public policy but rather by a travesty of public policy. During the submissions by the counsel for the corporation before us we intimated that we would only hear his submissions on the vires grounds, namely, the first and third issues as identified by the learned judge which in fact were the amended Defences Nos 6 and 7. (See p 58 of vol 1 of the record of appeal.) We allowed both counsel to submit the outlines of their case and the authorities in support.

It would be pertinent, in our view, in order to have a proper perspective of the issues in this appeal, to state correctly what the case was all about. In the first place, the action in the sessions court was for liquidated damages for breach of contract and secondly, the corporation mounted the defence based on ultra vires acts of its own officer/servant, Encik Mokhtar bin Haniff, the director of administration, so that the corporation was not bound by the impugned terms of the contract. Thirdly, and more significantly, we observe that it was not the case of the corporation that the whole of the agreement was null and void for being ultra vires, allegedly either the Act or the Enactment. The only clause of the agreement that was impugned was cl 11 and by extension cl 25(b) as it was interrelated to cl 11, being the remedy for breach thereof. The question whether Encik Mokhtar bin Haniff was legally competent to enter into and sign the agreement with the respondents was clearly and assuredly not the issue in the appeal before us or in the courts below. Neither was his authority to prepare and draft the agreement being questioned. We would endorse the learned judge's impeccable exposition of the contemporary doctrine of ultra vires and recognize its importance to the learned judge in laying down the basis of his judgment on the vires issues. We will advert to the authorities cited in relation to this topic in the course of our judgment where necessary. Our only comment on that part of his judgment is that his discussion on the ultra vires issues concerned the contemporary doctrine of ultra vires as generally understood in the field of corporate and administrative laws in relation to the exercise of statutory functions under the laws. He never entered into any discussion on ultra vires in the broader sense developed since the landmark case of *Anisminic Ltd v Foreign Compensation Commission & Anor*.[10] On the other hand, the learned counsel's arguments on the vires issues appeared more subtle than met the eyes, perhaps using the term ultra vires in his defence elliptically, not being particular whether he used it in the contemporary, narrow or broader sense. We will later in our judgment address ourselves on this point. The capacity of the corporation to enter into contract with the respondents on the sale of its link house was not questioned either as this was authorized by s 3 and by implication s 14(d) of the Enactment. The relevant and vital issue concerning Encik Mokhtar's competency or authority in preparing the agreement is with regard to the inclusion of cll 11 and 25(b) which were alleged to have been inserted in the agreement without express authority or otherwise. The inference was that

Encik Mokhtar bin Haniff acted, as it were, on his own initiative when he did so. Therefore, it is very clear in our minds that the appellant did not question the validity of the agreement as a whole and it would appear that the appellant accepted that the agreement was binding on them except cll 11 and 25(b); impliedly applying the doctrine of severance. We would also emphasize here that in cases where ultra vires is raised as an issue, the court is faced with problems of statutory interpretation.

Before we embark on the consideration of these issues we would interpolate at this juncture, as a matter of general interest, to make observations on the propriety or otherwise of the corporation's mounting a collateral attack on the validity of cll 11 and 25(b) of the agreement or on whether a direct attack should be the appropriate approach.

The corporation, after amending the statement of defence, raised the vires defence and this defence inexorably entails making a declaration of invalidity. The normal practice is for an aggrieved party affected by the ultra vires act to challenge its validity by judicial review either under O 53 r 1 by way of *certiorari* or by a declaration under O 15 r 16 of the Rules of the High Court 1980, ie by direct attack. As a general rule the court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Where some act or order is invalid or void the consequences are followed out logically: see *Wade on Administrative Law* (6th Ed) at p 333 where he gave instances when direct attack on vires act may be made. By way of illustration he quoted cases where actions for damages were brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction. If the order was *bad on its face* (emphasis added) the court would treat it as invalid. But if the jurisdictional defect was not *visible on the face* (emphasis added) as is in our case, the court would require the order first to be quashed in separate proceedings before the action for damages could be examined. Collateral attack was thus allowed in the first case but not in the second. The latest example of this procedural aspect of the case where a direct attack by judicial review was mounted to challenge the validity of the regulations is to be found in the House of Lords case of *R v IRC, ex p Woolwich Building Society*[11] at p 1402.

In the present appeal the question of invalidity of cll 11 and 25(b) for being ultra vires was raised before the sessions court and this raises the piquant question whether that court was competent to determine this issue because ex facie these clauses did not include obvious jurisdictional defect. We must bear in mind in dealing with this issue the provisions of s 25(2) of the Courts of Judicature Act 1964 (Rev 1972), O 53 r 1 and O 15 r 16 of the Rules of the High Court 1980 on the one hand and ss 65 and 69(g) of the Subordinate Courts Act 1948 (Rev 1972) and also the various observations by eminent English judges on this issue. For instance, Lord Hailsham of St Marylebone LC in the case of *London & Clydeside Estates Ltd v Aberdeen District Council & Anor*[12] at p 187 said:

> ... The certificate was effective until it was struck down by a competent authority (cf *Brayhead (Ascot) Ltd v Berkshire County Council* [1962] 1 QB 229; *James v Minister of Housing and Local Government* [1968] AC 409).

Lord Hailsham also quoted the case of *Calvin v Carr*[13] where Lord Wilberforce said of a contention that a decision of the stewards of the Australian Jockey Club was void for breach of natural justice:

A This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix on one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law ...

B Lord Diplock in the case of *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry*[14] at p 365 had this to say:

Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings C inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument ...

Lord Radcliffe made observations to the same effect in the case of *Smith v* D *East Elloe Rural District Council*[15] at p 769 where he said:

At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paras 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good E faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders ...

The case of *Quietlynn Ltd v Plymouth City Council*[16] is also relevant where F the question of the incompetency of the magistrate's court to decide on vires defence was decided.

There may be cases on the issue which decide to the contrary. Unfortunately, this issue was never raised in the courts below, counsel being content to assume that it was not such an important issue as to warrant serious effort on their parts and serious consideration by the court G or perhaps they adopted a presumptuous attitude in this regard or simply out of ignorance. Practising lawyers may well be advised to look and examine this issue and be prepared to address the court in future when the issue is raised, either in the lower courts or before this court. We are not aware that this issue has ever been decided in our court. We would, therefore, refuse to make any definitive finding on this important issue H because we did not have the advantage of hearing a full and well researched argument on it.

At p 332, Prof Wade suggested that a local authority may plead the invalidity of it's own repairs notices in resisting tenants' applications for grants to meet the cost of compliance and he quoted the case of *R v Lambeth BC, ex p Clayhope Properties Ltd.*[17] Lord Fraser of Tullybelton in I *Wandsworth LBC v Winder*[18] had similar suggestion in mind when at p 509 he observed:

But there may be other ways of obtaining speedy decisions; for example in some cases it may be possible for a public authority itself to initiate proceedings for judicial review ...

If the corporation seriously considered that the terms of its own sale and purchase agreement were null and void for being ultra vires on these authorities the corporation should obtain a declaration of invalidity of these two clauses and not to wait for the vendors to take action against them for breach of the agreement and to raise the vires defence to exonerate itself from its liability under the agreement.

To revert to the crucial issues that called for our determination, we would refer to Defence Nos 6 and 7 as they appeared in the reamended statement of defence at p 57 of vol 1 of the record of appeal, categorized by the learned judge as the second and third issues in his judgment at p 15 of vol 1 of the record of appeal. For the sake of convenience the two defences are reproduced verbatim:

> 6 And/or alternatively, the said cl 11 was included in the agreement without the authority of the defendants and therefore is not binding on the defendants.
>
> 7 And/or alternatively, the said clause is void for being ultra vires; and/or being illegal as being contrary to s 2(1)(b) of the said Act.

It is noteworthy that in Defence No 6, the corporation refrained from mentioning that the impugned clause was ultra vires either the Enactment or the Housing Developers (Control and Licensing) Act 1966, rest content with the notion that it was ultra vires because it was inserted without the authority of the defendants. However, in defence no 7, the corporation was more specific in stating that cl 11 was void for being ultra vires and being illegal as being contrary to s 2(1)(b) of the Act. Under the circumstances, it is incumbent upon us to determine the crucial question whether cll 11 and 25(b) are in any way vitiated by the doctrine of ultra vires from the standpoint of public law rather than the private law of contract, as it was explicit from the learned counsel's submissions that the vires issues were raised in respect of the provisions of the Enactment and seemingly the Act as well, and in what way could these clauses become void thereby. For the sake of completeness we will reproduce cll 11 and 25(b) which are as follows:

> 11 The said building shall be completed and ready for occupation by the purchaser within eighteen (18) calendar months from the date hereof and vacant possession of the said property shall be delivered to the purchaser within eighteen (18) calendar months from the date hereof provided that the vendor shall not be liable for any failure to fulfil any term of this agreement if such fulfilment is delayed hindered or prevented by strike or combination of workmen, lockout, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, acts of god, floods or tempest, or failure to obtain any necessary sanction or approval of any local or other competent authority or any other circumstances of whatsoever nature beyond the control of the vendor.
>
> 25 The vendor hereby undertakes and agrees with the purchaser that:
>
> ...
>
> (b) Subject to the provisions of the proviso to cl 11 hereof the vendor shall indemnify the purchaser for any delay in the delivery of vacant possession of the said property to the purchaser. The amount of indemnity shall be calculated at the prescribed rate from such due date to the date of delivery but it is hereby agreed that the provisions of this paragraph

A shall be without prejudice to any other right or remedy available to the vendor hereunder. It is further expressly agreed that the prescribed rate means eleven per cent (11%) pa until otherwise decided by the vendor.

To start with the term ultra vires is apt to suggest the paradigm of a public authority stepping outside a clearly defined sphere of competence as is B illustrated in the cases of *AG v Great Eastern Railway*[3] and *Ashbury Railway Carriage & Iron Co v Riche*[4] and like cases cited in the judgment of the learned judge. On the other hand, official action, while being of a kind for which the authority is empowered, may be in some way erroneous and subject to reversal or modification bv a higher authority on appeal or by other process of judicial review. A clear distinction has to be made on the C character and effect of the official action for the purpose of a defence. Ultra vires as used in the cases quoted above is now referred to as the narrow or contemporary notion of ultra vires. However, since the case of *Anisminic Ltd v Foreign Compensation Commission & Anor,*[10] it has become increasingly clear from the authorities that the contemporary notion of ultra vires is by D no means confined to a situation where a public authority steps outside the boundaries of the field of activity allocated to it by the law. The notion of ultra vires now encompasses a situation where the public authority commits an error of law albeit that the authorities' action is undeniably of a kind falling within the field of activity allocated to it by the law. See *Wade on Administrative Law* (6th Ed) p 43. At p 44, Prof Wade commented:

E

> In general, however, the courts adhere firmly to the wide meaning of 'jurisdiction', since this is the sheet-anchor of their power to correct abuses. They appear to be willing to stretch the doctrine of ultra vires to cover virtually all situations where statutory power is exercised contrary to some legal principle ...

F The development of the doctrine of ultra vires since has led some writers to classify the new concept of ultra vires as ultra vires in the broad sense. Thus, where official action while being within the scope of the authority of the law or a corporation if it becomes erroneous on some grounds such action would now be described as ultra vires, being outside jurisdiction, under the broad concept of ultra vires. Examples of ultra vires used in this G sense and the grounds therefore are succinctly illustrated by Lord Pearce in the *Anisminic* case[10] at p 195, Lord Reid in the same case at p 171 and Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.*[19] For the sake of convenience, the remarks of Lord Reid at p 171 of the *Anisminic* case[10] is reproduced:

H

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that I its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that

> it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly...

Although Lord Reid was talking about a tribunal, the same principle would apply in the case of an officer exercising his discretion or authority under the provisions of a statute.

Regrettably, with respect, the learned counsel for the corporation had not made our task easier by intimating to us in what context he used the term ultra vires, and it seems that he used the term loosely, not being aware whether he was using it in the narrow or broad sense, leaving it as it were to the court to sort out the difference and perform the necessary denouement. The ellipsis seemed also to extend over to the term 'without authority' as used in the sixth defence as will be shown later in the judgment. Unconsciously perhaps, these terms were expressed in the two defences rather elliptically.

Much as we dislike to say it, it would appear to us that the learned counsel was engaged in mental gymnastics, making twists and turns in his arguments over the sixth defence, the arguments lacking in articulation and coherence, though most certainly not in robust effort to argue this difficult appeal so far as the corporation was concerned on the grounds canvassed before us. In the first place the learned counsel did not categorically explain in what way the impugned clause was inserted without authority and in this respect digressed a great deal in his submissions before us from the stand that was taken in Defence No 6. He questioned Encik Mokhtar's authority to insert the offending clause by reference to absence of express authority given by the corporation. He complained that there was no evidence of any express authority given by the corporation and ventured the suggestion that it was for the respondents to prove the existence of such authority, express or otherwise. On this point we could not but agree with the learned judge on the grounds given in his judgment that there was evidence that Encik Mokhtar bin Haniff was authorized administratively to insert all the terms of the agreement, including cll 11 and 25. We could find no basis to flaw the judgment on this issue. It must be borne in mind that it was the corporation's case that Encik Mokhtar bin Haniff acted without authority in whatever sense the word 'authority' was used, thus rendering his action ultra vires when he inserted cll 11 and 25 in the agreement and therefore the burden of proof had shifted on the corporation to prove absence of authority, express or otherwise. The word 'authority' could mean administrative authority given by a superior to a junior officer, in the instant case the general manager to the director of administration or could mean statutory authority or to use the conventional term 'jurisdiction' but we are left to guess for ourselves in what sense it was used in the sixth defence. Section 101 of the Evidence Act 1956 (Rev 1971) is relevant.

To reinforce our view on this issue we would cite again the case of *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry*[14] and especially the observation of Lord Diplock at p 365:

> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the *legality of acts done pursuant to the law declared by it are presumed* ...

Similarly in the case of *R v Panel on Take-Overs And Mergers, ex p Datafin PLC & Anor*,[20] Sir John Donaldson MR at p 840 expressed the view on this subject in the following words:

> I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely, that however wrong they may be, however lacking in jurisdiction they may be, *they subsist and remain fully effective unless and until they are set aside by a court of competent* jurisdiction ...(Emphasis added.)

The maxim *omnia praesumuntur rite et solemniter esse acta* is applicable to establish the presumed validity of Encik Mokhtar bin Haniff's acts while performing his duties of the corporation. The schedule of duties gave Encik Mokhtar blanket administrative authority to act in his sphere of responsibility and we do not expect an officer of such seniority in the corporation to need specific instructions every time he carried out his duties or exercised his initiative. Somehow, the idea of onus of proof to prove the validity of cll 11 and 25(b) should be on the respondents surfaced in learned counsel's submissions but it is established by authorities that the onus of proof rests upon the party alleging invalidity. In the case of *Minister of National Revenue v Wrights' Canadian Ropes Ltd*,[21] Lord Greene MR at p 122 made the following remarks:

> ... It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court, in their Lordships' opinion, cannot interfere ...

Another authority is the case of *Fawcett Properties Ltd v Buckingham County Council*[22] affirmed by the House of Lords in [1961] AC 636. This is a case where certain conditions laid down by the respondents' counsel were attacked as being invalid and at p 575 Pearce LJ on the subject of onus of proof said:

> ... The *Wednesbury* case makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, that is, that they disregarded something which they should have taken into account or regarded something which they should not have taken into account. *The onus of showing this is on the person seeking to upset the condition*

imposed by the authority. That onus may be discharged either by showing from the terms of the condition itself that the authority cannot have taken into account the right considerations or by extrinsic evidence to that effect ... (Emphasis added.)

Nothing of the sort was done by the corporation in the sessions court to discharge this onus although learned counsel harped on the absence of authority in his submissions and inexplicably placed the onus on the respondents to prove existence of such authority. So far, as was also found by the learned judge, on evidence and on the law the learned counsel had not on balance convinced us that Encik Mokhtar bin Haniff acted without authority, either administrative or statutory, of the corporation. The learned counsel for the corporation attempted by arguments on the law of agency and the law on express and ostensible authority, quoting such cases as *Freeman v Buckhurst;*[23] *Chew Hock San v Connaught;*[24] *Brady v Todd,*[25] but having regard to what we have said above, these cases are irrelevant and of no avail to the corporation.

The next limb or twist in the corporation's arguments before us revolved around the question of want of authority of Encik Mokhtar bin Haniff, vis-a-vis certain provisions of the Enactment. Here it was obvious that the learned counsel in using the term 'authority' was referring to statutory authority, in particular, he had apparently in mind ss 14(d) and 20(c) of the Enactment. Section 14 reads:

14 It shall be the duty of the Corporation:

(a) to promote the development of agricultural, industrial, commercial trading and residential areas and/or projects in the State designated for such purposes; and to undertake agricultural, industrial, commercial trading and housing enterprises;

(b) with the concurrence of the State Authority to finance, carry out or assist in carrying out any scheme of urban and rural development or redevelopment;

(bb) to develop and manage industrial estates and sites in the State;

(c) to undertake land reclamation work and participate in mining activities;

(d) *to do all such other acts and things as are necessary for the exercise or performance of all or any of the functions and duties of the Corporation*;

(e) to act as local authority in areas outside local authorities if so authorised in accordance with any written law.

Section 20(c) reads:

The Fund may be applied to defraying the following charges:

...

(c) all costs, charges and expenses of and *incidental to the exercise of the powers* of the Corporation under this Enactment. (Emphasis added.)

In brief, the learned counsel contended that cl 11 was outside the scope of these provisions despite any administrative authority given by the general manager to Encik Mokhtar bin Haniff to prepare and draft the agreement on the ground that it was not necessary for the purpose of the exercise of the corporation's function to complete and sell low cost houses and it was not necessary to fix a definite date of completion and delivery of possession of the houses to the buyers. Hence, by doing so Encik Mokhtar bin Haniff had

A acted outside the purview of s 14(d) and therefore it was an unauthorized act. In his view the idea of a time frame for the completion of the contract and the liquidated damages for failure to complete within the time frame was unnecessary and that this clause was not a usual term of a contract of the type under consideration. Surely learned counsel cannot seriously believe that a clause in the agreement prepared by Encik Mokhtar bin Haniff with B the authority of the corporation was ultra vires s 14(d) because it contained terms which in his view were not usual terms. The validity or otherwise of the clause cannot be determined by the use of the word 'usual' by the learned judge when he held that the clause was inter vires, but by examining the clause against the section to ascertain whether it is within or without its C purview. We do not think for a moment that the learned judge decided the vires status of the impugned clause in favour of the respondents simply because it contained the usual clause in any sale and purchase agreement involving houses. His judgment definitely negatives such suggestion. The relevant question is whether the clause is governed by the section so as to give the corporation jurisdiction to deal with it or not and if it does not then D the question of it being ultra vires the section cannot arise.

The case of *Brady v Todd*[25] was referred to us just to show that in that case, according to learned counsel, there was evidence of a usual practice where horses were sold by horse dealers or their agents and in the usual course of selling warranty was given or required to be answered to complete E the sale. On its facts the case is not directly relevant on the question of ultra vires and we will therefore not discuss it here. If learned counsel strongly felt that the learned judge was not entitled to refer to cl 11 as a usual clause because there was no evidence regarding it then, as we have pointed out earlier, the burden is not on the defendant but on the plaintiff to provide evidence that such a clause was not usual in any sale and purchase F agreements, particularly in the property development sector.

This argument has a ring of being specious to it and could not be sustained because the learned counsel's construction of s 14(d) was palpably misconceived. Paragraph (d) in our view refers to acts as are incidental or necessary for the purpose of the performance of the functions and duties of the corporation on the principles as laid down in the case of *AG v Crayford* G *Urban District Council*[6] and of *AG v Great Eastern Railway*[3] and in the instant case those acts referred to in para (d) must, in our view, fairly and reasonably relate to all those duties specified in paras (a), (b), (bb) and (c) of s 14, including the housing enterprise. Those acts may invariably include such acts as levelling of the site, laying the foundation of the houses, construction H of access roads, drains, provision of electricity and water supplies and the employment of contractors or sub-contractors to carry out all these acts. That, in our view, is the context in which the word 'necessary' in para (d) should be understood.

The learned counsel for the corporation also referred us to the case of *Tham Seow Hing v Chop Kwong Fatt Cheong*[26] to buttress his argument I relating to what was necessary in the context of s 14(d). This is a case of an unauthorized borrowing by the branch manager of the defendant in Singapore. There was evidence that the Singapore agent/manager had no authority to borrow money. It was held that an agent had no implied

authority to borrow money unless it was necessary for the purpose of its duties as there was evidence that for the purpose of the business in the Singapore branch borrowing would never be necessary. Again, we must say the case has no bearing either on facts or on law in the instant case. The word 'necesssary' there was used in the ordinary sense and not in the context of a statutory provision. A

In any event, para (d) would reinforce the respondents' case in that it entitled the corporation to enter into the necessary and attendant agreements with all the contractors and sub-contractors the terms of which agreements were matters to be agreed by the parties. Clauses 11 and 25(b) are contractual terms and are not governed, unless specifically provided in the Enactment, by the provisions of the Enactment much less s 14(d) properly and correctly construed. In the final analysis on the grounds stated above we conclude on this limb of the corportion's argument that the impugned clauses do not come within the purview of s 10(d) and by the same token are not ultra vires, but valid and effective. B C

The arguments on the sixth defence bifurcated in the course of learned counsel's submissions into a sub-limb raising a further ground to support his contention that the payment of liquidated damages and interest under cl 25(b) was ultra vires the provision of s 20(c) of the Enactment. It was the thrust of the argument that the payment of liquidated damages or indemnity and interest was neither necessary nor incidental to the carrying out of the functions and business of the corporation, repeating the contention advanced in the lower courts. It was also submitted that the corporation was a peculiar body and its fund had to be approved by the Federal Treasury but instead of offering evidence to support the contention the learned counsel merely referred to the constitution of the corporation where it was provided under s 5(1)(d) that the three representatives of the Federal Government were also members of the corporation and that under s 19(a) it was provided that the fund of the corporation also consisted of sums of money donated by the federal government. Such argument, in our view, reflected the learned counsel's lack of knowledge on how statutory bodies in Malaysia operate. It is true in practice that where statutory bodies in the states of Malaysia receive grants from the Federal Government on their incorporation to assist them to commence operation its representatives will normally be required to sit as members of the statutory bodies, but they do not decide on their own nor do they give directions as to how the funds are to be expended. Of course they do, as expected of them, give their opinions on any matters under discussion at any meeting of the corporation, particularly, whether a particular project to be undertaken is viable or not. More often than not the federal representatives come from the Federal Treasury, the Economic Planning Unit of the Prime Minister's Department and another relevant agency, and their experience and familiarity with federal government economic policies are useful for the proper functioning of the statutory bodies. We also bear in mind that the corporation is not solely engaged in housing development but also in other economic activities within the ambit of s 14(a) of the Enactment. D E F G H I

The main reason for the vesting of ownership of any form of industries, public utilities, industrial and commercial enterprises in statutory bodies,

such as FLDA, SEDCs, MAS and PETRONAS to name a few, instead of continuing to bring them within the framework of normal departmental administration is to encourage a competitive spirit of initiative and enterprise. The civil service ethos, would, it was thought, inhibit the managerial staff of the industries enterprises from making untried experiments in new fields, it would induce an excess of caution and addiction of precedents, all manner of orders and circulars. Officials would always be looking over their shoulders, apprehensive of the parliamentary inquisition in the form of examination of expenditure before the public accounts committee or the auditor-general. All statutory bodies are expected to conduct their affairs in a business-like manner and carry out their undertakings as commercial and industrial undertakings, operating in the public interest and to be self-supporting over a period of time. (See Stanley De Smith & Rodney Brazier on *Constitutional and Administrative Law* at p 221.)

In brief, the corporation had to be business-minded and the thinking must be business orientated in order to survive and succeed in the competitive world of business and should not depend on government grants throughout for their expenditure and survival. It is also true that some statutory bodies are not profit-making orientated and not productive but this depends on the objects and purposes for which they were established. A glance at s 19(c) and (d) will show that the corporation is not a statutory body orientated to offer donations and social benefits gratis like the social welfare or charitable organizations. The agreement itself contains provisions whereby the corporation may receive payment by way of interests for late payments (cl 2(c)), forfeiture of deposits in default of payment of any instalment (cl 19), to charge expenses as a result of public auctions (cl 19) and indemnity for breach of any law or regulation (cl 8). As an industrial orientated body the corporation is expected to suffer losses at one time or another like any other businesses and not to make profits all the way. We could not blind ourselves to the realities of business life and neither can the corporation if it wishes to embark on industrial and economic enterprises.

As for s 20(c) it must be carefully noted and appreciated that the fund may be expended not only to all the costs, charges and expenses of the exercise of the powers of the corporation under the Enactment but also to such costs, etc incidental to the exercise of those powers. If losses or liabilities are incurred on account of the construction and sales of the corporation's houses we do not hesitate to say that they must be accounted for out of the fund because since we have decided that cl 11 is valid then it follows any expenses incurred on account of the breach of cl 11 is also valid and can be defrayed from the fund. It is the responsibility of the corporation to find money to pay the respondents after it had incurred the liability. If such losses or liabilities were never anticipated because of the naivety of the corporation then it has to act under s 21A to submit a supplementary estimate of expenditure. In any event, years have passed since the breach took place and since the sessions court decision on the action there is ample time for the corporation to include all the losses in its current estimates. As the corporation had been engaged in industrial and economic developments we can see no way out for the corporation to absolve itself from its liability under its own agreement. Risk of losses are the everyday hazards of

businessmen and corporate bodies, the corporation not being the exception to the rule. It would be relevant, while on this issue, to quote Jessel MR's words in the case of *Printing and Numerical Registering Co v Sampson*[27] at p 465:

> ... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

Defence No 7 can hardly be tenable and does not deserve serious consideration, relying as it did on the doctrine of ultra vires and alternatively on illegality with reference to s 2(1)(b) of the Act which are not relevant to serve as a basis for an allegation of ultra vires acts. It was contended by the learned counsel for the corporation that under s 2(1)(b) of the Act, the corporation was exempted from its provisions, and because of the exemption, it was unlawful for the corporation to adopt any of the provisions of the Housing Developers (Control and Licensing) Rules 1970 ('the Rules'), and the provisions of the agreement, such as cll 11 and 25(b) taken from or modelled upon r 12(o) and (r), were therefore ultra vires and illegal. We were also told that the Act and the Rules made thereunder were for the protection of house buyers. We are mindful of the fact that the Act was intended to protect innocent buyers from some unscrupulous and dishonest housing developers. There had been instances of developers who abandoned their housing projects when running out of funds to complete them, or heavily indebted to banks or financial institutions and absconded after having accepted deposits or full payments from the prospective buyers, especially during hard times in the property market. Many also had become bankrupts while others disappeared overseas out of the clutches of the law and legal process. In *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*[28] at p 34 the origin and history of this Act was explained by Suffian LP [as he then was] thus:

> ... It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest pa to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why r 12 was enacted and in particular paras (o) and (r) thereof.

Most assuredly and beyond argument the Act was intended to protect buyers against developers, other than government statutory bodies, both state and federal, engaged in housing developments which would not abandon their projects even in the midst of vicissitude in the property market. We, therefore, could understand why the learned judge made short shrift of this contention holding at p 30 of vol 1 of the record of appeal:

> ... It is true that the Act does not apply to the defendants for it provides by s 2(1) that nothing in the Act shall apply to anybody or agency established by statute or the government of any state. That, however, is a far cry from saying that the defendants were prohibited from entering into a form of contract contemplated by the Act. That they were at liberty to enter into such a contract is emphasized

by s 2(1)(b) of the Enactment which left the defendants free to choose its own terms. In the event they so chose.

We would express our concurrence in this finding.

The learned counsel's contention on this defence essentially was that because the corporation was exempted from the provisions of the Act and the Rules made thereunder, the corporation was prohibited from adopting any provisions of the rules and incorporate them in its sale and purchase agreements. If the corporation incorporated cll 11 and 25(b) in the agreement such clauses would be ultra vires, being illegal and in contravention of the saving provisions of s 2(1) of the Act. This proposition is a startlingly novel one and learned counsel could not support it with authorities and we believe there are no authorities on this contention. Honestly, we find the proposition incomprehensible and in contradiction toto calco to the established doctrine of ultra vires as known in corporate and administrative laws, whether in the contemporary or post-Anisminic sense. We know not of such principles of law in existence. If, as the learned counsel suggested, the corporation was a unique statutory body geared towards providing low cost or medium cost houses without profit-making as its objective in order to benefit the ordinary people, it would certainly bolster this image and promote the avowed objectives and be advantageous to the ordinary buyers if suitable provisions of the rules are incorporated in all of the corporation's sale and purchase agreements as they are for the protection of their interests rather than to their detriment. In any event, there is nothing in the Act and the Rules which prohibits the corporation from incorporating in its agreements of similar nature any provisions from the Rules and nothing to render, in the event of their adoption by the corporation, the incorporated clauses invalid. There is no invalidating provisions in the Act or the Rules to enable us to declare the Act invalid in that event.

Moreover, even on evidence, there was nothing to indicate that the terms of cll 11 and 25(b) were taken from r 12(o) and (r). On the contrary, the evidence of Encik Mokhtar bin Haniff showed that he was not even aware of the existence of the Act, much less of s 2(1) and the Rules although these two clauses might appear to be identical. The explanation for the similarity was given by Encik Mokhtar bin Haniff when he said he took these terms from a sale and purchase agreement when he bought his house. (See p 73 of vol 2 of the record of appeal.) How such contention can be advanced in the teeth of this evidence and absence of extrinsic evidence to the contrary is beyond our comprehension. In the result, it is our finding that the impugned clauses are neither ultra vires nor illegal vis-a-vis the Act and that the seventh defence is totally without merits.

In the final analysis the ineluctable conclusion is that the two impugned clauses are not ultra vires the corporation or the provisions of the Enactment or the Act, either with reference to contemporary or post-Anisminic notion of ultra vires, based on jurisdictional principles as adverted to and explained earlier on in the judgment, and that both defences must fail in spite of the ingenuity and robust arguments of the learned counsel to the contrary.

We had earlier on indicated that we did not wish to hear submissions on the rest of the defences as we have decided that we agreed with the decisions of the courts below and that there were no merits on those defences; Defences Nos 3, 4 and 5 in particular. Nevertheless, we would

like to say briefly on the third and fourth defences which involved, according to the learned counsel for the respondents, the question of public policy. It was observed that these defences were raised on the basis of the proviso to cl 11 which was later, after several amendments to the statement of defence, attacked as invalid. These defences would cancel themselves out automatically as the proviso would not be available to the corporation to mount such defences. It would seem that the corporation took the stand that the clause was only valid if it served its purpose but invalid for the purpose of the respondents, thus contradicting itself, bearing in mind that Defences Nos 6 and 7 were not even an alternative to Defence No 5.

It also occurs to us from the material before the courts below that the new economic policy, inter alia, was not designed to encourage Bumiputra entrepreneurs when given opportunities and privileges to secure contracts from the government or semi-government bodies to make defaults in the performance of their contractual obligations with impunity. Once their tenders for the contracts were accepted they must perform their obligations subject to the penalties and the rights of the party wronged for remedies available to them in law. The privileges accorded to Bumiputra contractors must cease somewhere and we assume that it is not the primary objective of the new economic policy to patronize them indefinitely, regardless of the consequences. There is nothing wrong with the new economic policy as a national policy with regard to Bumiputras and, if anything, it is the implementation of the new economic policy that should be questioned. They made their beds and must lie on them. According to the corporation's submissions the link houses were built as low or medium cost houses and that it made no profits out of this project and therefore the respondents should not take advantage of cl 11 to pander to their human frailties. We need only to say that we are not called upon here to adjudge the appeal on moral but on legal issues arising out of a contract which was lawfully and willingly entered into by the corporation. The judgment may appear to be harsh on the corporation but it is the court's function to decide the appeal according to law and not to sentiment.

We would conclude on this subject by quoting once again Jessel MR's aphorism which had already been quoted earlier on in the *Sampson*'s case:[27]

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice ...

We would for the reasons given above dismiss this appeal with costs here and below. The deposit to be awarded to the respondents on account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim